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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The memorandum order of the United States District Court for the Eastern District of Louisiana (R. 23) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 37-39) is reported at 190 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1951 (R. 40). The petition for

a writ of certiorari was filed on October 1, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, both courts below were correct in holding that this action should be dismissed because venue was improperly laid in the District Court for the Eastern District of Louisiana.

STATUTES INVOLVED

28 U.S.C. [Supp. IV] 1391 (b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

28 U.S.C. [Supp. IV] 1406 (a) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

STATEMENT

On January 2, 1947, respondent L. F. Guerre, the Regional Manager of the Veterans Administration at New Orleans, notified petitioner, an honorably discharged veteran of World War I, in writing of charges against him and of his proposed discharge as authorization officer, P & S-4, in the Regional Office in New Orleans (R. 9). After petitioner filed an answer to the charges, respondent Guerre advised petitioner by letter dated

February 14, 1947, that he would be separated from his duties effective at the close of business March 2, 1947 (R. 8, 9).

On February 21, 1947, petitioner filed an appeal under Section 14 of the Veterans Preference Act of 1944 with the Tenth Regional Office of the United States Civil Service Commission. The Regional Board concluded, after a hearing, that petitioner's separation was not warranted, and recommended that he be restored to his position (R. 8). From this decision, the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission in Washington, D. C. (R. 8). Following a hearing in Washington, the Commission informed petitioner that it had reversed the findings of the Tenth Regional Civil Service Board and had approved the action of the Veterans Administration removing him from office (R. 8). Petitioner was then granted a further hearing before the Commission, which reaffirmed the propriety of petitioner's separation (R. 8).

On March 31, 1948, petitioner instituted this suit in the District Court for the Eastern District of Louisiana (R. 6-16), contending that his removal was illegal and praying that the United States Civil Service Commission be ordered to direct the reinstatement of the petitioner to his former position and that petitioner be compensated from the date of separation to the date of payment (R. 15). The United States Civil Service Commission and L. F. Guerre, the Regional Manager of the Veterans Administration, were named as defendants (R. 1). Respondents moved to dismiss the complaint because of improper venue and lack of juris-

diction (R. 3). After this motion was denied (R. 3), respondents filed an answer which, by way of separate defense, reasserted the defenses of improper venue and lack of jurisdiction (R. 19-20). Petitioner then moved for summary judgment, and respondents filed a counter-motion for summary judgment (R. 4). The district court granted respondents' motion, holding that it lacked jurisdiction over the persons of the United States Civil Service Commissioners because of improper venue, and dismissed petitioner's suit on the ground that the Commissioners are indispensable parties to the action who had not and could not be subjected to the jurisdiction of the court (R. 23). On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment below without prejudice to further proceedings by petitioner in the proper venue (R. 37-40).

ARGUMENT

The decision of the court below, dismissing the complaint without prejudice for improper venue, is, we submit, clearly correct; there is no conflict, and no other ground for review by this Court.

In this suit, petitioner challenges the decision of the United States Civil Service Commission which reversed the findings of the Tenth Civil Service Regional Board and approved the action of the Veterans Administration removing him from his position—a decision which is binding upon the employing agency.[1] Petitioner prays that he "is entitled to an order from the United States Civil

[1] Section 14 of the Veterans Preference Act (5 U.S.C. (Supp. IV) 863) provides that "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends."

Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration" (R. 15). It is clear, therefore, that the Civil Service Commissioners are indispensable parties to this suit, and so the courts have held in comparable cases. *Money* v. *Wallin*, 186 F. 2d 411 (C.A. 3), certiorari denied, 341 U.S. 935; *Podovinnikoff* v. *Miller*, 179 F. 2d 937, 938 (C.A. 3); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97, 101 (C.A. 4). Cf. *Williams* v. *Fanning*, 332 U. S. 490, 493.

It is equally clear, as the court below pointed out, "that the Commission's official situs and legal domicile is in the District of Columbia, where its plenary powers are exercised, though many of its subordinate and ministerial functions are necessarily carried out locally by regional officials who act, not by virtue of their own authority, but solely under the control and direction of the Commission" (R. 38). Cf. *Podovinnikoff* v. *Miller*, *supra*; *Clement Martin* v. *Dick Corp.*, 97 F. Supp. 961 (W.D. Pa.); *Hartmann* v. *Federal Reserve Bank of Philadelphia*, 55 F. Supp. 801 (E.D. Pa.). Since 28 U.S.C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," it follows that venue was improperly laid in the District Court for the Eastern District of Louisiana. Cf. *Putnam* v. *Ickes*, 78 F. 2d 223 (C.A.D.C.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).[2]

[2] Petitioner's argument that Section 10 (b) of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009 (b),

To meet this basic obstacle to the maintenance of the action herein, petitioner primarily argues that the action is not against the Commissioners themselves as individuals but against the Commission as an entity and agency of the United States—that, for all intents and purposes, the proceeding is against the United States. Since the United States is ubiquitous, petitioner contends that venue may be laid in any court of competent jurisdiction (Pet. p. 16).

By so arguing, however, petitioner raises a further bar to the maintenance of his cause. If, despite the fact that the United States has not been named, this suit is one against the United States, rather than a suit against officers of the United

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which permits suit to be brought "in any court of competent jurisdiction," waives the subsequently enacted venue requirements of 28 U.S.C. 1406 (a) (Pet. p. 8) is without merit. The legislative history of the Administrative Procedure Act reveals the express Congressional understanding that Section 10 (b) "does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety." S. Doc. No. 248, 79th Cong., 2nd Sess. p. 276. See also Representative Walter's statement to the same effect, p. 369. Moreover, since petitioner requests mandatory relief against the Commission, asserting that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position * * *" (R. 15), it is evident that the district court below is not a court of competent jurisdiction within the meaning of Section 10 (b) of the Administrative Procedure Act. For it is well settled that district courts other than the District Court for the District of Columbia have no authority to grant relief in the nature of mandamus. *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109, 110; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C.A. 1). That petitioner also requests declaratory relief does not alter the rule. *Marshall* v. *Crotty*, *supra*; *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.).

States, the district court below has jurisdiction only if the United States has expressly consented to be sued. Cf. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682.[3] In so far as petitioner seeks to be restored to his position in the Government service, there can be no question that neither the Veterans' Preference Act, nor any other act, including the Tucker Act, authorizes suit for such relief against the Commission as an entity, the employing agency, or the United States *eo nomine*, and petitioner does not point to any such grant of jurisdiction. And insofar as petitioner prays to be compensated from the date of separation to the date of payment, it is equally plain that that relief cannot be obtained in the district courts because the courts lack jurisdiction over the subject matter of such a claim. At the time this suit was instituted, 28 U.S.C. 1346 (d) (2) provided that "the district courts shall not have jurisdiction under this section of any civil action to recover fees, salary, or compen-

[3] Where Congress has conferred jurisdiction upon the district courts to entertain suits against the Civil Service Commission as an entity, it has done so expressly. See Sec. 12 (c) of the Hatch Act of August 2, 1939, 53 Stat. 1147, as amended, 54 Stat. 767, 5 U.S.C. (Supp. IV) 118 k (c); cf. *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. Parenthetically, it may be noted that Section 12 (c) of the Hatch Act specifically deals with the problem of venue, providing that "any party aggrieved by any determination or order of the Commission under subsection (b) may * * * institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides * * *." In this connection, it should also be pointed out that the holding in *Seven-Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4), that the Federal Housing Administration may be sued in any court of competent jurisdiction, is based on a specific provision in the National Housing Act, 49 Stat. 722, 12 U.S.C. 1702, which declares that the Federal Housing Administrator may sue or be sued.

sation for official services of officers of the United States."[4] Such actions lie only in the Court of Claims. Cf. *Borak* v. *Biddle*, 141 F. 2d 278, 281 (C.A.D.C.), certiorari denied, 323 U. S. 738; *Wittner* v. *United States*, 110 C. Cls. 231. Accordingly, under petitioner's theory of the case, the action falls for lack of jurisdiction.[5]

Petitioner further contends that respondents waived their objection to venue by filing an answer on the merits. Petitioner thus ignores the fact that, prior to the filing of the answer, respondents

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[4] That petitioner comes within the purview of Section 1346 (d) (2) is made clear by an amendment to that Section enacted on October 31, 1951. As amended, Section 1346 (d) (2) reads (P.L. 248, 82d Cong., 1st Sess.):

> (d) The district courts shall not have jurisdiction under this section of:
>
> (2) Any civil action or claim to recover fees, salary or compensation for official services of *officers or employees* of the United States. [Emphasis added].

Discussion of the bill on the floor of the House reveals that this amendment is intended to be "merely clarifying and corrective as to certain titles of the code" and not a change in substantive law. 97 Cong. Rec. 13945 (daily ed.).

Prior to the passage of this amendment, this Court granted certiorari in *Joseph B. Bruner* v. *United States*, No. 391, this Term, certiorari granted, October 22, 1951, which expressly raised the question of whether a government civilian fire fighter was an "officer" within the meaning of Section 1346 (d) (2). The explanation by Congress that the term "officers" is meant to include "employees" of the United States makes clear the correctness of the ruling of the lower court in the *Bruner* case (190 F. 2d 427, C.A. 5). In the instant case, petitioner's position as authorization officer with the Veterans Administration is clearly in the class of "officers" of the United States, thus bringing him within the purview of Section 1346 (d) (2) as it read both prior and subsequent to its amendment.

[5] Moreover, under *United States* v. *Sherwood*, 312 U.S. 584, respondents Guerre and the Civil Service Commission could not properly be joined as parties to a suit against the United States under the Tucker Act.

expressly raised the question of venue in a motion to dismiss, and that the question was again raised by way of separate defenses in the answer itself (R. 3, 19). Rule 12 (b) of the Federal Rules of Civil Procedure expressly provides that objections to jurisdiction or venue can be made by answer or motion. In this case it was done by both. In these circumstances, it is now settled that, having made its objections to jurisdiction or venue under Rule 12 (b), a defendant does not waive his defenses by answering on the merits. Cf. *Hoiness* v. *United States*, 335 U.S. 297, 301-302; *Untersinger* v. *United States*, 172 F. 2d 298 (C.A. 2); *Orr* v. *United States*, 174 F. 2d 577 (C.A. 2); *Orange Theatre Corporation* v. *Rayherstz Amusement Corporation*, 139 F. 2d 871, 874 (C.A. 3).

Lastly, petitioner urges that, if venue was improperly laid in the district court below it was mandatory under the language of 28 U.S.C. 1406 (a), as it appeared at the time suit was brought, for the court to "transfer such case to any district or division in which it could have been brought" (Pet. p. 17-18). Assuming this to be so,[6] the court

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[6] As amended on May 24, 1949 (63 Stat. 101), Section 1406 (a) now vests discretion in the court to make the transfer "if it be in the interest of justice." Although the original form of Section 1406 (a) apparently made such transfer mandatory, the legislative history of the amendment thereto reveals that Congress did not so intend. Thus, the House Committee on the Judiciary stated: "This section removes an ambiguity in section 1406 (a) of title 28, U.S.C., by substituting 'may' for 'shall', thus making it clear that the court may decline to transfer a case brought in the wrong district under circumstances where it would not be in the interest of justice to make such transfer." H. Rept. No. 352, 81st Cong., 1st Sess., p. 14; see also S. Rept. No. 303, 81st Cong., 1st Sess., p. 4. In any event, since the amended version was in force at the time respondents' first motion was denied on June 13,

nevertheless correctly refused to transfer the action to the District Court for the District of Columbia since, as respondent Guerre is a resident of Louisiana, the suit could not have originally been brought in the District of Columbia.[7] Cf. *Putnam* v. *Ickes*, 78 F. 2d 223 (C.A.D.C.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).

1949, that language and not the original form of Section 1406 (a) is herein applicable. Cf. *Untersinger* v. *United States*, 87 F. Supp. 532 (S.D.N.Y.), affirmed, 181 F. 2d 953 (C.A. 2); *Orr* v. *United States*, 174 F. 2d 577, 580 (C.A. 2).

[7] It should be noted that, since the action was dismissed without prejudice, petitioner can, of course, institute a new action in the District of Columbia. If the employing agency be deemed an indispensable party, petitioner can obtain jurisdiction over the Veterans Administration by naming the Veterans Administrator a party defendant instead of respondent Guerre, the Regional Manager of the Veterans Administration, who has no independent statutory authority but is delegated authority by the Veterans Administrator.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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